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No. 85-1277

Supreme Court, U.S.

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**In The Supreme Court Of  
The United States**

**October Term, 1985**

**SCHOOL BOARD OF NASSAU  
COUNTY, FLORIDA; and CRAIG MARSH,**  
*Individually and as Superintendent  
of Schools of Nassau County, Florida,  
Petitioners,*

**vs.**

**GENE H. ARLINE,**  
*Respondent.*

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE PETITIONERS**

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**QUESTIONS PRESENTED FOR REVIEW**

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.* § 794.

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## **OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. A, pp. 1-11) is reported at 772 F.2d 759. The opinion of the district court (Pet. App. C, pp. 13-16) is not reported.

## **JURISDICTION**

The opinion of the Court of Appeals (Pet. App. A, pp. 1-11) was entered on September 30, 1985. A petition for rehearing with a suggestion for rehearing *en banc* was denied on November 8, 1985 (Pet. App. B, p. 12). The petition for a writ of certiorari was filed on January 27, 1986, and was granted on April 21, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

## **STATUTES INVOLVED**

29 U.S.C. § 794 states:

No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

29 U.S.C. § 706(7)(B) states:

Subject to the second sentence of this subparagraph, the term "handicapped individual" means ... any individual who (i) has a physical or mental impairment which substantially limits one or more

of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

## **STATEMENT OF THE CASE**

In January 1966, Respondent submitted an application to the Petitioner, School Board of Nassau County, Florida, seeking employment as an elementary school teacher (R. 46-47). The application form contained an inquiry regarding whether Respondent had any "physical defects or peculiarities." In response to this inquiry, Respondent answered "none," and otherwise failed to inform Petitioner School Board that she had been diagnosed as having tuberculosis in 1957. (R.47). Respondent was hired by the school board as a third grade teacher (R. 60-61).

Respondent suffered three relapses of her tuberculosis in the years 1977 and 1978 (J.A. 12). After the first two of these relapses, Respondent was temporarily

suspended from her teaching duties and allowed to return after her tuberculosis had been treated. (J.A. 81-82). After Respondent's third relapse, however, in November 1978, she was discharged, the decision to terminate her teaching duties being prompted by the recommendation of Dr. Marianne McEuen, a specialist in tuberculosis, who advised Petitioners that Respondent should not be teaching third-grade students. (J.A. 9-10). The question of Respondent's effectiveness as a teacher was not involved in the decision to discharge her, insofar as she was admittedly competent to perform all the day-to-day duties required of an elementary school teacher.

Respondent did not apply for, or otherwise express any real interest in obtaining, an alternative position from Petitioner School Board, either at the time of her discharge or thereafter. (R.65-67). Instead, she initially sought relief for her discharge in state administrative proceedings, contending that her discharge violated her rights under the continuing contract which she held as an elementary school teacher. These administrative proceedings ultimately resulted in a decision by the First District Court of Appeal of the State of Florida, which held that Respondent's dismissal was not a breach of her continuing contract, insofar as her tubercular condition constituted "good and sufficient cause" for her discharge. *School Board of Nassau County v. Arline*, 408 So.2d 706, (Fla. Dist. Ct. App. 1982).

Respondent then brought this action in the United States District Court for the Middle District of Florida,

seeking relief under 29 U.S.C. 794 and 42 U.S.C. 1983. Her complaint was filed on March 23, 1983 (J.A., docket sheet) and Petitioners answered the Amended Complaint on July 1, 1982 (J.A., docket sheet). The cause came on for trial on November 17, 1983. At the trial the District Court heard the testimony of Marianne McEuen, M.D., a physician specializing in tuberculosis, who testified concerning Respondent's previous diagnosis of that disease. Dr. McEuen also described the characteristics of tuberculosis as an infectious disease which is capable of being transmitted from one individual to another by means of coughing, sneezing or other respiratory activity including simply breathing. Dr. McEuen further testified that young children are particularly susceptible to catching this disease. She continued her testimony by stating that all persons are capable of contracting it when exposed to a person who is infectious, and that there is no known immunity to the disease. (J.A. 4-11, 16-27).

Dr. McEuen's testimony at trial also included a description of the procedures which are used to diagnose tuberculosis. These involve the taking of a sputum specimen from persons suspected of having the disease and allowing the specimen to grow into a culture, which is then tested. Dr. McEuen stated that the specimen must be given six to eight weeks to grow before a definite diagnosis can be made, as a result of which there is always a possibility that the individual being tested may have been carrying the disease, and thereby subjecting others to its transmission, for a significant period of time before the presence of the disease can be retroactively determined. Dr. McEuen

testified that she had recommended to Petitioner School Board that Respondent not be allowed to continue in her elementary school teaching position, based upon the diagnosis of Respondent's tuberculosis. (J.A. 16-18).

Petitioner Craig Marsh, Superintendent of Schools of Nassau County, testified at the trial that pursuant to the advice of Dr. McEuen and other medical experts, he had recommended to petitioner School Board that Respondent be discharged from her elementary-teaching position, and that the School Board had followed this recommendation. (J.A. 81-84).

At the conclusion of the evidence, the District Court rendered an oral decision for Petitioners (Pet. App. C, pp. 13-16). That court held that Respondent had failed to prove any valid claim under 42 U.S.C. § 1983, since the state administrative proceedings had accorded her all the substantive and procedural due process rights to which she was entitled. (Pet. App. C, pp. 13-14). With respect to Respondent's claims under Section 504 of the Rehabilitation Act, the District Court stated:

In this regard we have to look at the plaintiff and, first of all, decide whether she is in fact a handicapped person under the terms of that statute. And the Court hereby finds that she is not such a handicapped person. No question that she suffers a handicap and it is most unfortunate that she suffers or did suffer from this particular infectious tuberculosis, but it's difficult for this Court to conceive that Congress intended contagious

diseases to be included within the definition of a handicapped person as that act has been implemented and decided by the various courts. I'm aware that the courts have held that alcoholism, cancer, blindness, various other things, have been determined to be handicapped persons, but it's just the Court's opinion that an infectious disease such as the plaintiff in this case had, in my opinion, does not fall within that handicapped definition. But even assuming that it did fall within that definition, then we have to look to see whether or not she is otherwise qualified. And the Court finds that she was not qualified to teach in other than elementary education. And although the school board has a local policy which does permit working out of field or out of certification for a period of time while an individual is attempting to obtain certification in the particular field in which she is working out of, there is no obligation on the part of the school to do so.

Thirdly, the school board has a duty to the public which it serves, and although the risk may be less if the plaintiff were employed in teaching adults or older students who move from classroom to classroom, I cannot believe that Congress intended that school boards should not look out for the very public which it serves and would intend that a school board would keep someone in the employ who, unfortunately, suffered from such an infectious or contagious disease.

(Pet. App. C, pp. 14-15).

Respondent appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit, which reversed with regard to Respondent's Section 504 claim. *Arline v. School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985). (Pet. App. A. pp. 1-11). The Court of Appeals held that Respondent did suffer from a "handicap" within the meaning of Section 504, and remanded for a determination by the District Court as to whether the risks of infection presented by Respondent's condition precluded her from being "otherwise qualified" for the position of elementary school teacher or some other unspecified position within Petitioners' school system.

Petitioners timely sought a writ of certiorari, which this Court granted on April 21, 1986.

## **SUMMARY OF THE ARGUMENT**

### **I. THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. 794**

- A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE STATUTE
- B. THE COURT OF APPEALS' DECISION IS CONTRARY TO EXPRESSIONS OF LEGISLATIVE INTENT

Although the definitions included in 29 U.S.C. 704 (1973) are very broad, nowhere in the Act do the words "tuberculosis" or "infectious disease" occur. Looking to the definitions, it can be said that even under the broad definitions the Respondent does not suffer from a handicap. Congress could, indeed, have included infectious diseases but chose not to; nor has any court, prior to the decision on review, extended coverage under the Act to include contagious diseases.

Florida law requires children to be free from communicable diseases prior to entering public school. Therefore, an absurd result would occur should a teacher with active tuberculosis be allowed to teach disease-free children.

Historically, the legislatures of several states and the federal government have treated and considered, through various legislative enactments and court rulings, the

separate and distinct nature of contagious diseases. The overriding principle of the well-being of the general public has been, traditionally, considered paramount and sufficient reason to isolate and treat separately those suffering from contagious diseases.

**II. WHETHER ONE WHO IS AFFLICTED WITH THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS IS PRECLUDED FROM BEING "OTHERWISE QUALIFIED" FOR THE JOB OF ELEMENTARY SCHOOL TEACHER, WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973 29 U.S.C. 794**

The direct pronouncement by this Court in the landmark case of *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), defined and clarified those instances in which an employee or claimant under 29 U.S.C. 794, Section 504, who is determined to be "handicapped", is or is not "otherwise qualified". It is now clear and no longer subject to reasonable debate that the test is whether "an otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap". *supra* at 2367.

In this case, Petitioners argue simply that a reasonable requirement for an elementary school teacher is that he or she be free of contagious diseases which reasonably might infect children who are "highly susceptible" to contagion. The District Court was correct in finding the Respondent, GENE H. ARLINE, not to be "otherwise qualified".

**ARGUMENT**

The Petitioners at the outset remind this Court that Respondent, GENE H. ARLINE, is not in the posture of one who sought employment and was rejected because of an alleged handicap. Rather, she was discharged from her position as a tenured teacher after three "relapses" or positive tests for the contagious disease of tuberculosis. Were this not the case and had Respondent been a job applicant who had been rejected, this case would be presented to the Court in a different light.

A great deal of testimony was adduced at the trial before the District Court as to Respondent's condition at the time of the trial. All such testimony, Petitioners argue, is irrelevant. The inquiry of the appeals court and this Court should properly have been, and is now:

"Was the Respondent, Gene H. Arline, improperly terminated from her position as an elementary school teacher (and hence discriminated against) because of a handicap?"

The Eleventh Circuit Court of Appeals, in its reversal of the District Court, determined that the broad definition contained in the Act and in the regulations promulgated by the Department of Health and Human Services was broad enough to include tuberculosis. No party to this proceeding has at any time suggested that anywhere in the Act or in the regulations do the words "tuberculosis" or "infectious disease" occur. Simply stated, Congress was utterly silent and in all probability never considered

infectious tuberculosis in enacting the Rehabilitation Act of 1973.<sup>1</sup>

Petitioners now argue that a contagious, infectious disease is not a handicap within the meaning of 29 U.S.C. 794 (1973).

<sup>1</sup>Petitioners' reading of the transcripts of hearings before the various Congressional committees and subcommittees prior to passage of the Rehabilitation Act of 1973 has failed to locate any discussion, comments or questions raised as to contagious diseases in any context.

The stated purpose of Congress in passing the Rehabilitation Act of 1973 was to fully integrate the handicapped into the mainstream of American life "to the maximum extent possible." *S. Rep. No. 890*, 95th Cong., 2d Sess. 39 (1978). To that end, Congress included Section 504 as part of its overall statutory scheme. That section provides:

No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ...

29 U.S.C. § 794. The Rehabilitation Act further contains a statutory definition of what constitutes a "handicapped individual" for purposes of Section 504. That definition is found in Section 7 (7) of the Act, which provides:

Subject to the second sentence of this subparagraph, the term "handicapped individual" means ... any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in

question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

29 U.S.C. § 706(7)(B).

Previous decisional law indicates that a plaintiff must allege and prove four distinct elements in order to state a claim for relief under Section 504: (1) that the plaintiff is a "handicapped individual;" (2) that the plaintiff is "otherwise qualified" for the position sought; (3) that the plaintiff was excluded from such position "solely by reason of" his handicap; and (4) that the discriminatory exclusion occurred in the context of a program or activity receiving federal financial assistance. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Doe v. New York University*, 666 F.2d 761, 774-75 (2d Cir. 1981). The instant case involves a consideration of the first three<sup>2</sup> of these elements.

In part I of this brief, Petitioners will demonstrate that the infectious, contagious disease of tuberculosis, in and of itself, cannot properly be deemed to constitute a "handicap" within the meaning of Section 504. In part II,

<sup>2</sup>However, as this Court has observed, although the requirements that a plaintiff show she is "otherwise qualified," and that she was excluded "solely by reason of" a handicap are sometimes separately stated as distinct elements, they are in actuality separate sides of the same coin, since a handicapped individual who is excluded from a covered program because she is not "otherwise qualified," and cannot be made so by reasonable efforts at accommodation, is not excluded "solely by reason of a handicap." *Alexander v. Choate*, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 712, 720, n.19 (1985).

Petitioners will further show that even if it is assumed that this disease does constitute a "handicap," it is at the same time a condition which invariably presents such risks to the health of others, particularly small children, as to preclude its victims from being "otherwise qualified" to perform the job of an elementary school teacher. Petitioners submit that for either or both of these reasons, the decision of the Court of Appeals below must be reversed.

**I. THE CONTAGIOUS, INFECTIOUS DISEASE OF TUBERCULOSIS DOES NOT CONSTITUTE A "HANDICAP" WITHIN THE MEANING OF SECTION 504 OF THE REHABILITATION ACT OF 1973, 29 U.S.C. § 794.**

The Court of Appeals held that Respondent's tuberculosis constituted a "handicap" within the meaning of Section 504, due to its view that this condition fell "neatly within the statutory and regulatory framework" and its inability to find any evidence of a Congressional intent to exclude contagious diseases from the definition of a handicap. 772 F.2d at 764. (Pet. App. A, pp. 8-9). Petitioners respectfully submit that the Court of Appeals was wrong on both counts. The disease of tuberculosis does not *per se* constitute a "handicap" within the statutory definition, and to construe the term "handicap" so as to include infectious, contagious diseases is contrary to the intent of Congress, as expressed in the Rehabilitation Act and other congressional acts.

**A. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE RELEVANT STATUTORY LANGUAGE.**

The Court of Appeals was correct in using the language of the statute as the starting point in its interpretation of Section 504. *Southeastern Community College v. Davis*, *supra* 442 U.S. at 405. However, the Court of Appeals' analysis of that language was flawed, and its conclusion accordingly erroneous.

In order to qualify as a "handicapped individual," as defined by Section 7(7) (B) of the Rehabilitation Act [29 U.S.C. § 706(7) (B)], and thus come under the protection of Section 504, an individual must demonstrate that he or she either (1) has a "physical or mental impairment which substantially limits one or more ... major life activities," (2) has a record of such an "impairment," or (3) is regarded as having an "impairment." It is evident that the requirement of an "impairment" of the affected individual is common to all these definitions. The commonly accepted meaning of the term "impairment" is a diminution in quantity, value, or strength. *Webster's New Collegiate Dictionary* 415 (1960); *de la Torres v. Bolger*, 610 F.Supp. 593, 596 (N.D. Tex. 1985). Thus, the statutory definition of the term "handicapped individual" indicates that Congress only intended to include individuals having *diminished physical or mental capabilities*, or who were perceived or regarded as having such diminished abilities, within the scope of that term. (This Court has recognized that the Act was intended to protect those who have "*other abilities that permit them to meet the requirements of various programs*," despite a "*limiting physical or mental impairment*." *Southeastern Community College v. Davis*, *supra*, 442 U.S. at 406-07 n.6 (emphasis added).

The definition of "impairment" does not include infectious, contagious diseases which may impair the health of others. As set forth herein, Congress never intended that the term "handicap" should include physical conditions which impair the health of others through exposure to infectious, contagious diseases.

A brief discussion of the nature of tuberculosis will serve to demonstrate that the disease, if it could be isolated, does not always carry with it a "physical or mental impairment" of the effected individual so as to qualify as a "handicap" under the Rehabilitation Act. In the most basic sense, tuberculosis is described as an "infectious disease caused by the tubercle bacillus and characterized by the production of tubercles or lesions." *See, e.g., Webster's New Collegiate Dictionary*, *supra*; *Webster's New World Dictionary* (2d Col. ed 1982); 2 J. Schmidt, *Attorney's Dictionary of Medicine & Word Finder* 900.24 (1971); *Merck, Manual of Diagnosis & Therapy* (R. Berkow ed. 19) describes tuberculosis as:

*An acute or chronic infection caused by mycobacterium tuberculosis and rarely in the U.S.A. by M. bovis. it is almost always initiated by inhalation. Pulmonary disease is most common, but disease can spread via the lymphatics and bloodstream to any other organ. TB is characterized clinically by a lifelong balance between the host and the infection in which pulmonary or extrapulmonary foci may reactivate at any time, often after long periods of latency; and pathologically by the formation of*

tubercles made up of giant cells and epithelioid cells, by a tendency for fibrosis to occur, and by caseation, a unique form of nonliquifying necrosis.

*Id.* at 112 (some emphasis added). Dr. McEuen offered a similar description of the disease at the trial below, characterizing tuberculosis as an "infectious organism" which is subject to being spread from one individual to another by various means (J.A. 6, 16).

Thus, tuberculosis in its broadest sense is essentially an infectious organism which *can* have certain physical manifestations upon those who are afflicted with it. However, whether and to what extent an individual with tuberculosis will suffer from physical impairments as a result of the disease is by no means certain. Some individuals may be impaired, have the disease go into remission and show no apparent effects and thereafter have the disease re-surface, as with Respondent herein. As Dr. McEuen testified:

There are symptoms which are considered classical symptoms of tuberculosis, but *many people with tuberculosis have minimal or no symptoms*, but there are specific symptoms ... The typical symptoms of tuberculosis are cough, chest pain, weight loss, fever, night sweats and the degree of symptoms depends on the degree of disease. (J.A. 6)

The disease may exist and not cause an obvious physical impairment to the individual carrying the disease. This

compounds the difficulty in diagnosing and, in fact, the danger of the disease because "an undiagnosed and untreated patient may remain in relatively good health for prolonged periods while maintaining a high degree of infectiousness." *Merck, supra* at 115.

The Department of Health and Human Services, Social Security Administration, has recognized in its regulations that tuberculosis does not always impose a serious physical impairment on its sufferers, although it can cause such an impairment in some cases. Thus, 20 C.F.R. Part 404, Subpart P, Appendix I, § 3.00(b) (1985), in defining those impairments which will qualify an individual for receipt of social security disability benefits, provides:

*Pulmonary tuberculosis will be evaluated on the basis of the resulting impairment to the pulmonary function. Evidence of infectious or active pulmonary tuberculosis such as positive cultures, increasing lesions, or cavitation is not, by itself, a basis for determining that an individual has a severe impairment which is expected to last twelve (12) months.* (some emphasis added).

In short, it is evident that while certain of the individuals having tuberculosis may be obviously impaired by the disease, others may not. It is quite possible for an individual to be a carrier of the tuberculosis organism and be spreading it to others while not displaying any outward indication of a physical or mental impairment.

An absurd result, not intended by Congress, is reached if the infectious, contagious disease tuberculosis is judicially termed to be a handicap. In Florida, children between the ages of six (6) and sixteen (16) are required to attend school. Section 232.01 (1)(2), Florida Statutes (App.1) The children are thus a captive audience. Any child in Florida before entering public school must be tested for and be free of communicable diseases. Section 232.02, Florida Statutes (App.1) Florida school boards are responsible for proper attention to the health of the children enrolled. Section 230.23 (6), Florida Statutes (App. 3). Thus, the absurd result arises: A disease-free child peculiarly susceptible to contracting tuberculosis is placed in a setting with an individual having an infectious, contagious disease that can be transmitted merely by breathing. Congress, Petitioners argue, never intended the term "handicap" to be interpreted to reach such an absurd result.

In the construction to be placed upon the term "handicap", the intent of Congress is controlling. *Diamond v. Chakrabarty*, 100 S. Ct. 2204 (1980). It must be presumed that undesirable consequences were not intended.

The State of Florida is not unlike the vast majority of other states in its enactment of laws regarding the treatment of and care for persons affected by various communicable diseases including tuberculosis.<sup>3</sup> A brief review

<sup>3</sup>See Brief of *amicus curiae*, National School Board Association for survey of other state laws similar to those of Florida.

of some of those laws is now cited to demonstrate that Florida, like other states, has traditionally had a vital concern for the health of all its citizens, both those suffering from communicable diseases and those who might become infected through exposure. For instance, Florida has established separate hospitals for persons suffering from tuberculosis. (See Florida Statute 392.01). Another section of Florida law provides that one who suffers from that disease may be involuntarily confined. (See Florida Statute 395.25). Additionally, Florida has promulgated an administrative rule, Rule 6A-15.092 (App. 4) which delineates the treatment for mentally and physically impaired children in certain residential facilities. Under this rule, a qualified child prior to admittance to a residential facility, must be "free from any infectious disease." Thus, it is seen that a physically or mentally handicapped child with an infectious disease is, by law, segregated and treated in a different manner for the very obvious reason of protecting the health of fellow students in such residential facilities.

The case law construing the term a "handicapped individual" under Section 504 forcefully demonstrates that Congress did not intend every individual suffering from every perceivable kind of mental or physical impairment to be protected by the Act. To the contrary, whether such an impairment "substantially limits" an individual's "major life activities", so as to render an individual "handi-

capped" is a factual question to be determined on a case-by-case basis. *Oesterling v. Walters*, 760 F.2d 859, 861 (8th Cir. 1985). Thus, even when a person is found to have a definite physical impairment, that person will not be deemed to be "handicapped" unless the limitation imposes a *substantial* limitation on his or her major life activities. It is not sufficient to demonstrate that the impairment precludes the person from performing a particular job for a particular employer. *Id.*; *Jasany v. United Postal Service*, 755 F.2d 1244 (6th Cir. 1985); *de la Torres v. Bolger*, 610 F. Supp. 593 (N.D. Tex. 1985); *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984).

It is interesting to note that prior to 1985, very few decisions had been rendered where the threshold decision of "handicap" had been determined adversely to a plaintiff. The above authorities indicate that more recently the courts are apparently taking a harder look at the conditions asserted by plaintiffs to be "handicaps" and the *Jasany*, (supra), case is a good example of a federal appeals court resisting the temptation to include every illness known to humankind as a "handicap". These authorities further demonstrate that not every physical condition, even though affecting the individual in some manner in his pursuit of employment will be judicially determined to be a qualified handicap under 29 U.S.C. 794, Section 504.

It is, indeed, perplexing to find any justification for the finding in the last paragraph of the decision by the 11th Circuit Court of Appeals. The Court stated (in

considering what the School Board had done) that it had to review the School Board's actions to determine if they were based on "... conclusory statements ... being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice." Using such a test, apparently derived from *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), it concluded as follows, referring to the District Court:

"Rather, it simply concluded that the school board was exempt from any duty whatever to weigh the actual costs and risks involved in accommodating Arline because of an overriding 'duty to the public it serves'."

In short, the Court of Appeals was apparently accusing the School Board of making its finding, and the District Court of approving it, based on a knee-jerk reaction, based on some traditional "taboo" of tuberculosis. This particular finding by the Appeals Court totally ignored the fact that the Petitioners acted on the specific advice of a medical expert and only acted after the Respondent's third relapse within a seventeen (17) month period. These facts, Petitioners suggest, were overlooked or simply not considered by the Appeals Court and certainly formed the "substantial basis" for both the action of the School Board and the recommendation preceding it by Craig Marsh, the Superintendent of Schools for Nassau County.

**B. THE COURT OF APPEALS' DECISION  
IS CONTRARY TO VARIOUS  
EXPRESSIONS OF THE LEGISLATIVE  
INTENT**

The Court of Appeals' conclusion that it could find "not a scintilla of evidence" that Congress intended to exclude contagious diseases from the definition of a "handicap" as used in the Rehabilitation Act, 772 F.2d at 764 (Pet. App. A, p. 9), is erroneous. There are in fact substantial reasons for believing that Congress had precisely such an intention, and would have more clearly expressed that intention had it fully considered the matter.

In one instance, Congress chose to specifically exclude from the definition of "handicapped individuals" alcoholics and drug abusers whose current use of alcohol or drugs would constitute a threat to the health or safety of others. 29 U.S.C. § 706(7)(B). This exclusion is evidence of a Congressional intent to exclude individuals who, though undoubtedly suffering from a "mental or physical impairment," were thought to pose a risk to others under circumstances where even reasonable accommodation by the employer could not suffice to entirely eliminate the risk. In view of Congress' exclusion of one class of "handicapped individuals" from the protections of the act, it appears that Congress would have created a similar exclusion for contagious diseases had it considered the possible application of Section 504 to such conditions.

The fact of the matter, however, is that Congress apparently never contemplated the possibility that Section

504 would be construed so as to provide protection to persons with contagious diseases. Although the legislative history of the Rehabilitation Act is extensive,<sup>4</sup> there is absolutely no mention therein of the question regarding whether the Act would afford any protection to those with tuberculosis or other contagious diseases. Such an oversight is itself some indication that Congress never intended Section 504 to have any application to such individuals, *United States v. University Hospital, State University of New York at Stony Brook*, 729 F.2d 144, 159-160 (2d Cir. 1984), particularly where communicable diseases do not fall within the plain meaning of the statutory definition of a handicap, *Id.*

Had Congress desired to include contagious diseases within the ambit of the definition of handicap, it could easily have done so. Compare, *N.Y. Executive Law ("Human Rights" Law) Section 292.21* (Consol. 1983), which defines a "disability" as a "physical, mental or medical impairment which . . . is demonstrated by medically accepted clinical or laboratory diagnostic techniques." (emphasis added). Such a definition would have undoubtedly encompassed *any illness*, regardless of whether that illness caused an actual or perceived impairment of one's mental or physical abilities.

<sup>4</sup>See, e.g., *H. R. Rep. Nos. 928, 1581, 92d Cong., 2d Sess. (1972); S. Rep. No. 1135, 92d Cong., 2d Sess. (1972); H. R. Rep. Nos. 42, 244, 500, 93d Cong., 1st Sess. (1973); S. Rep. Nos. 48, 318, 391, 93d Cong., 1st Sess. (1973); S. Rep. No. 1297, 93d Cong., 2d Sess. (1974); H. R. Rep. Nos. 1149, 1780, 95th Cong., 2d Sess. (1978); S. Rep. No. 890, 95th Cong., 2d Sess. (1978); 119 Cong. Rec. 18117, 24550, 29698, 30148 (1973); 124 Cong. Rec. 13885, 30292, 30559, 31590 (1978). (Citations to various committee hearings not included.)*

However, the language finally decided upon by Congress is restricted in scope to those conditions which constitute substantially limiting physical or mental impairments. Since Congress could have expressly and unambiguously prohibited recipients of federal financial assistance from discriminating against persons with contagious diseases, but did not do so, this Court should be reluctant to impose such an obligation on federal grantees as a condition of their receipt of federal funds. *Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176, 204 n. 26 (1982).

In short, Congress' primary concern with conditions which are (or are perceived as being) "physical or mental impairments" is demonstrated not only by the language finally decided upon by Congress, but also by the fact that Congress could have defined "handicaps" to explicitly include contagious diseases had it desired to do so. The final draft of Section 7 (7)(B), as well as its earlier versions, reflect that Congress was exclusively concerned with "impairments which had a real or perceived effect on an individual's ability to function physically or mentally". See *S. Rep. No. 1297*, 93d Cong., 2d Sess. (1974), reprinted in 4 *U.S. Code Cong. & Admin. News* 6373 (1974) (stating that Section 7(7) initially defined a handicapped individual as one with an impairment which substantially limited such person's "functioning" or one or more "major life activities", but that language regarding limitations on "functioning" was deleted as "redundant". *Id.* at 6388).

These indicia of Congress' intent, as reflected in the adoption of the Rehabilitation Act, reinforce the view that

the meaning of a "handicap" for purposes of the Act should be limited to the scope of the statutory definition itself, i.e., a real or perceived "impairment" of one's mental or physical abilities, with a resulting limitation on "major life activities". Such a definition, as noted above, does not include a carrier of a contagious disease who demonstrated no external manifestations of a physical or mental impairment.

Moreover, while the legislative intent behind the Rehabilitation Act itself may be somewhat ambiguous, there is no question that the Court of Appeals' interpretation of "handicaps" to include the contagious disease of tuberculosis creates a conflict with expressions of Congressional intent on other occasions and in other contexts. More than once, Congress has demonstrated a strong concern with preventing the spread of communicable diseases in general, and tuberculosis in particular. See, 42, U.S.C. § 264<sup>3</sup> (authorizing regulations to prevent spread of communicable diseases); 42 U.S.C. 247(b) (authorizing substantial grants to control spread of communicable diseases, including tuberculosis); 25 U.S.C. § 198 (authorizing Secretary of Interior to quarantine Indians having contagious or infectious diseases, including

<sup>3</sup>On Monday, June 23, 1986, the Department of Justice, Office of Legal Counsel, issued a lengthy opinion authored by Charles J. Cooper, addressed to the General Counsel of the Department of Health and Human Services. Since Petitioners' Brief was in rough draft form and ready for the printer, a short extension was granted by the Clerk and the materials included in this section of the Brief have been re-written to include a portion of that opinion. Petitioners especially direct the Court's attention to the treatment in that paper of the historical aspects of communicable diseases as set out in pages 39 through 44. A copy of that opinion has been lodged with the Clerk for reference.

tuberculosis); 8 U.S.C. § 1285 (prohibiting employment of aliens with tuberculosis and other "dangerous contagious diseases" on international flights or vessel passages). Several executive pronouncements and administrative rules implementing these statutes have similarly recognized Congress' serious concern in controlling tuberculosis and other contagious diseases. See, Exec. Order No. 12452, 48 Fed. Reg. 56,927 (1983), [implementing 42 U.S.C. § 264(b)]; 21 C.F.R. § 1240.54; 42 C.F.R. §§ 34.2(7), 34.4. Of course, there is an inherent inconsistency in concluding, as the court of appeals did, that notwithstanding these clear expressions of Congress' repeated sanction of isolating persons with contagious diseases as a means of preventing their spread, Congress nevertheless intended to include individuals with such diseases within the protection of the Rehabilitation Act, the stated purpose of the which was to "fully integrate" the handicapped into "the mainstream of life in America." S. Rep. No. 890, 95th Con., 2d Sess. 39 (1978).

In short, contrary to the Court of Appeals' view, there are in fact certain indications of a Congressional intention to exclude persons with tuberculosis and other contagious diseases from the scope of the protections granted to "handicapped individuals" by Section 504 of the Rehabilitation Act. The exclusion dealing with alcoholics and drug addicts, the failure to specifically include "demonstrable medical impairments," and Congress' response to the threat of contagious diseases in other contexts all provide support for the district court's view that it is "inconceivable" that Congress would have

intended to include contagious diseases along with other more commonly recognized "handicaps." It is therefore respectfully submitted that this Court should reverse the decision below as a result of the Court of appeals' error in holding that Respondent was, as a matter of law, "handicapped" within the meaning of Section 504.

The Court of Appeals, in reversing the Judgment of the District Court, scrutinized the Rehabilitation Act in an apparent attempt to locate language which would exclude communicable diseases. Petitioners agree with the conclusions as set forth in the memorandum of the Department of Justice *Id.* that its approach was erroneous. Since Congress was silent on the matter in drafting the Act and since the Act could have substantial impact on state agencies and the vast legislative compendium of federal and state laws, the proper approach, Petitioners suggest, is to scrutinize the language of the statutes and supporting regulations to see if a particular disease or type of physical affliction is *included*. (emphasis added) This approach would be consistent with the recent case *Bowen v. American Hospital Ass'n.*, \_\_\_\_\_ U.S. \_\_\_\_\_ (1986) and with the earlier case of *Penhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). both which hold that unless language of Congress is clear and unambiguous, that extension of a federal regulatory act to the exclusion of state regulations and provisions cannot be presumed.

**II. ONE WHO IS AFFLICTED WITH THE  
CONTAGIOUS, INFECTIOUS DISEASE  
OF TUBERCULOSIS IS PRECLUDED  
FROM BEING "OTHERWISE  
QUALIFIED" FOR THE JOB OF  
ELEMENTARY SCHOOL TEACHER,  
WITHIN THE MEANING OF SECTION  
504 OF THE REHABILITATION ACT OF  
1973, 29 U.S.C. 794.**

The District Court in the instant case expressly found that Respondent's qualifications prevented her from being "otherwise qualified" to continue in her position. She was employed as an elementary school teacher and was only qualified for that position. The District Court as a trier of fact found that Respondent was not qualified to teach in other than elementary education. (Pet. App. C, pp. 14-15). Nevertheless, the Court of Appeals ordered a remand for an express determination as to whether Respondent's tuberculosis precluded her from being "otherwise qualified" for her job, or some other position in the school system. 772 F.2d at 765. (Pet. App. A, p. 11). However, as this Court apparently recognized in granting the Petition for Writ of Certiorari, the determination ordered by the Court of Appeals on remand is unnecessary, insofar as an individual afflicted with the infectious, contagious disease of tuberculosis is necessarily precluded, as a matter of law, from being "otherwise qualified" for the job of an elementary school teacher.

Applicable case law defines an "otherwise qualified" handicapped individual as one who is able, with or

without reasonable accommodation, to:

perform the essential functions of the position in question without endangering the health and safety of the individuals or others.

*Strutts v. Freeman*, 694 F.2d 666, 669, n.3 (11th Cir. 1983); *Prewitt v. United States Postal Service*, 662 F.2d 311 (5th Cir. 1981). It is manifest from this statement of the applicable standard that a Section 504 employer may legitimately consider the health and safety of its non-handicapped employees and its clientele in determining whether a handicapped individual is "otherwise qualified."

Decisions of this Court and others make it equally clear that an employee (or potential employee) may fail to satisfy the "otherwise qualified" requirement as a result of the very same condition which renders the employee a "handicapped individual" in the first place. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402 (5th Cir. 1983), rehearing en banc denied, 709 F.2d 712 (5th Cir. 1983), petition for leave to proceed in forma pauperis denied, 464 U.S. 1067, 465 U.S. 1098 (1984); *Doe v. New York University*, 666 F.2d 761 (2nd Cir. 1981); cf., *Mantolite v. Bolger*, 767 F.2d 1416 (9th Cir. 1985) (action under Section 501 of the Rehabilitation Act). Thus, in *Southeastern Community College v. Davis*, *supra*, this Court held that a deaf applicant for a nursing program was properly denied admission on the basis of her deafness, because she was not qualified

for the program for which she applied (or the profession to which it would lead), and could not have been made so by any reasonable efforts to accommodate her condition. This Court stated the applicable standard thusly:

Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," indicating only mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context.

The court below, however, believed that the "otherwise qualified" persons protected by § 504 include those who would be able to meet the requirements of a particular program in every respect except as to limitations imposed by their handicap. See 574 F.2d, at 1160. Taken literally, this holding would prevent an institution from taking into account any limitation resulting from the handicap, however disabling. It assumes, in effect, that a person need not meet legitimate physical requirements in order to be "otherwise qualified." We think the understanding of the District Court is closer to the plain meaning of the statutory language. *An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.*

442 U.S. at 405-06 (footnote omitted, emphasis added). The Court continued on to observe that while available means of "reasonably accommodating" the handicapped must be made in connection with the determination of whether the handicapped are "otherwise qualified," there is no obligation to make "fundamental" or "substantial" changes to a program which would compromise its essential nature as the price of rendering the handicapped "otherwise qualified" for the program. *Accord, Alexander v. Choate*, \_\_\_\_\_ U.S. \_\_\_\_\_, 105 S. Ct. 712, 720 (1985).

In *Doe v. Region 13 Mental Health-Mental Retardation Commission*, *supra*, the Fifth Circuit Court of Appeals applied the standards enunciated in *Southeastern Community College* to a factual situation which is in many respects strikingly similar to that of the instant case. The plaintiff in *Region 13* was a former psychiatric worker who was herself beset by psychiatric problems, consisting of depression with suicidal tendencies. Although the plaintiff was apparently an exemplary employee in most respects, her superiors were concerned that she would pass her suicidal tendencies along to her patients, and ultimately such concerns prompted them to discharge her. She then brought suit under Section 504, and the jury returned a verdict in her favor. However, the district court entered a judgment notwithstanding the verdict, on the ground that the evidence conclusively demonstrated the plaintiff was not "otherwise qualified." The Fifth Circuit affirmed, stating:

Because we find that the evidence overwhelmingly supported Dr. Stewart's action here with regard to Ms. Doe, we find that the district court did correctly grant the judgement notwithstanding the verdict.

We start with the premise that there was no evidence produced of any discriminatory animus against persons with handicaps such as Ms. Doe's. Significant testimony was presented supporting the fact that GCMHC had several employees who suffered from depression and who were undergoing psychiatric counseling. No action was shown to have been taken against these individuals because of their psychiatric problems. Further, while Ms. Doe would have us find damning the fact that GCMHC knew of her problems as early as April of 1979 and did nothing about them, we are not persuaded by this fact. Rather, it supports the defendants' contention that it was only when the problem worsened to an unacceptable level that Dr. Stewart felt that action was necessary.

In determining whether Ms. Doe was "otherwise qualified" under the Act, we believe that, in the absence of any evidence of such discriminatory animus as discussed above, we must analyze the actions by GCMHC to determine whether there was a substantial, reasonable basis for its decision. Then we must apply *Boeing Co. v Shipman* to determine whether the J.N.O.V. rendered was appropriate under this standard of review.

This standard, crucial to the analysis of employment decisions under section 504, is based on our reading of the Supreme Court's decision in *Southeastern Community College v. Davis*.

\* \* \* \*

We read this landmark case under section 504 to support a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person. To repeat, "an otherwise qualified person is one who is able to meet *all* of a program's requirements in spite of his handicap." 442 U.S. at 406, 99 S. Ct. at 2367 (emphasis added). This assumes, of course, that "a program's requirements" are reasonable. 442 U.S. at 414, 99 S.Ct. at 2371.

That we should grant deference to Dr. Stewart's decision in this case is underscored by the nature of the problem which is involved. This is not a case involving whether an employee is able to screw nuts and bolts onto a widget with sufficient speed. No such cut-and-dried factual proof is available when dealing with the "soft science" surrounding the health or affliction of an individual's psyche. Of course we must give weight to an expert's determination where there is no showing that such determination was skewed by unlawful animus.

\* \* \* \*

We believe that in cases of this sort

where, as here, there has been no showing of discriminatory animus, and where here is uncontroverted evidence of a chronic, deteriorating situation which is reasonably interpreted to pose a threat to the patients with whom the employee must work, no violation of section 504 could reasonably be found.

Substantial, rational bases existed for Dr. Stewart's action here. He could not be expected to stand idly by, knowing that Ms. Doe's behavioral disorder might have severe consequences for all concerned. Besides the deleterious effect which suicide or an attempt at suicide would have upon Ms. Doe's patients, there was the question of the ongoing deleterious effect which her continued suicidal ideation was having upon those patients, who were susceptible and suggestible adolescents. Despite the excellent record which Ms. Doe had compiled during her employment at GCMHC, the record fully supported the fact that Dr. Stewart did not act in a discriminatory manner with regard to the termination of her employment. She had been "otherwise qualified," but there was strong and overwhelming evidence, and considered professional opinion, that she was no longer "otherwise qualified."

We therefore conclude that, viewing the evidence under the proper legal standards set forth above, reasonable men could not have differed about the validity of the decision that she was no longer qualified made by Dr. Stewart and by GCMHC, and that the granting of the judgment notwithstanding the verdict was appropriate.

704 F.2d at 1409-10, 1412.

The foregoing authorities establish that even if Respondent's tuberculosis is viewed as a "handicap" within the meaning of Section 504, Respondent could nevertheless be properly discharged on the basis of unavoidable health risks created by her condition. In other words, the Petitioners have a right, Section 504 notwithstanding, to insist upon freedom from exposing others to infectious, contagious tuberculosis as a legitimate "physical qualification" for the job of elementary school teacher, as long as that qualification is shown to be based on a real risk, and one that cannot be dispensed with without compromising the essential objectives of the school system. Petitioners submit that since the risks are indeed quite real, and could not have been eliminated by any reasonable efforts to accommodate Respondent, there was no Section 504 violation in the decision to discharge her.

It has previously been noted that tuberculosis is an infectious organism which is capable of being transmitted to anyone. More importantly, Respondent was employed to teach a captive audience of elementary school age children and young children are particularly susceptible to the disease. Respondents close contact on a day to day basis with these young boys and girls renders her not "otherwise qualified". For this reason, when Respondent was diagnosed as having tuberculosis for the third time within a period of two (2) years, Dr. McEuen recommended that she be discharged from her elementary school

teaching position, and Petitioners followed this recommendation. In so doing, Petitioners did not violate either the letter or spirit of Section 504, but instead acted only to enforce legitimate requirements of the position involved.

As previously observed, Congress and the executive branch of the federal government have recognized a substantial governmental interest in controlling the spread of communicable diseases. (pp 27, 28 *supra*). However, the federal government is by no means alone in this regard, insofar as the states have recognized and acted upon a similar interest, particularly in the context of the public schools. *See, e.g.*, § 232.032, *Fla. Stat.* (1985) (immunization against communicable disease required of public school students); *Fla. Admin. Code* § 10D-3.93 (prohibiting individuals with contagious disease from being present in "sensitive situations," which term is defined to include the school setting); *Fla. Admin. Code* § 6A-15.09(2)(C)3.a.[1] (requiring lack of contagious diseases as condition for admission to special educational programs for handicapped children); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding state's compulsory vaccination program); *Wright v. DeWitt School District No. 1 of Arkansas County*, 385 S.W.2d 644 (Ark. 1965) (upholding compulsory vaccination of students); *People v. Ekerold*, 211 N.Y. 306, 105 N.E. 670 (1914) (same); *State v. Drew*, 89 N.H. 54, 192 A. 629 (1937) (same); *Board of Education of Mountain Lakes v. Maas*, 56 N.J. Super. 245, 152 A.2d 394 (1959) (same); *Adams v. Milwaukee*, 228 U.S. 572 (1913) (upholding city ordinance requiring testing of milk for tuberculosis). In light of the recognized legitimacy of the state's interest in preventing

the spread of communicable diseases in the public schools, it cannot be gainsaid that the absence of such a communicable disease (particularly tuberculosis, which can be spread by simple respiratory activity and to which small children are particularly susceptible) constitutes a legitimate "qualification" for the job of elementary school teacher. Indeed, the First District Court of Appeal of Florida essentially so held in *School Board of Nassau County v. Arline*, 408 So.2d 706 (Fla. Dist. Ct. App. 1982), wherein it was concluded that Respondent's tubercular condition constituted good cause for her dismissal from her elementary school position.

Respondent's principal argument in the Court of Appeals was that while the Petitioners' actions may have been motivated by a legitimate objective (preventing the spread of tuberculosis), the means chosen to attain that end (discharging Respondent) constituted an ill-informed, "knee-jerk" overreaction in a manner more severe than was justified by the facts. Thus, Respondent placed her principal reliance in the Court of Appeals on decisions such as *New York State Ass'n for Retarded Children, Inc., v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Strathie v. Dep't of Transportation*, 716 F.2d 227 (3d Cir. 1983); *Costner v. United States*, 31 Empl. Prac. Dec. (CCH) ¶ 33,446 (E.D. Mo. 1982), and *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981). These cases do support the general proposition that an employer may not justify policies or job requirements which adversely affect handicapped individuals on the basis of a vaguely-articulated objective of preventing

potential injurious consequences to others. Instead, these cases hold that in order to justify such a policy or requirement under Section 504, the employer must demonstrate that the articulated risk is real, and that the policy itself is reasonable in light of the risks involved, and is drawn no more broadly than is required by those risks.

However, the instant case is factually dissimilar from those relied upon by Respondent, in which the risks with which the employer claimed to have been concerned were either nonexistent or exaggerated. There can be no disputing the facts that Respondent is more likely than most individuals to suffer a relapse of active tuberculosis, that small children are particularly susceptible to that disease, that in an elementary school setting these children constitute a captive audience subjected to daily exposure and that there is no available means of determining whether an individual is infectious with tuberculosis until well after the period of infectiousness has commenced. *Merck, supra* at 112-14; [J.A.16-28).

Thus, notwithstanding Respondent's attempts to characterize the risk of contagion as minimal, that risk is nevertheless real, and petitioner's actions were not the product of an uninformed layman's reaction to a misunderstood condition, but were instead based on the sound medical advice of a specialist on tuberculosis.

In light of Respondent's attempts to "second-guess" Dr. McEuen's recommendation that Respondent be removed from her elementary school teaching position,

the following language from *United States v. Shinnick*, 219, F. Supp. 789 (E.D.N.Y. 1963) is appropriate to this case:

[T]he judgment required is that of a public health officer and not of a lawyer used to insist on positive evidence to support action; their task is to measure risk to the public and to seek for what can reassure and, not finding it, to proceed reasonably to make the public health secure. They deal in a terrible context and the consequences of mistaken indulgence can be irretrievably tragic. To supersede their judgment, there must be a reliable showing of error. The words cautioning against light use of isolation are indeed strong but the three medical men who testified manifestly shared a concern that was evident and real and reasoned . . . Their conclusion, reached in obvious good faith, cannot be challenged on the ground that they had no evidence of the exposure of Relator to the disease; they, simply, were not free and certainly not bound to ignore the facts that opportunity for exposure existed during four days in Stockholm, that no one on earth could know for fourteen days whether or not there had been exposure, and that Relator, with a history of unsuccessful vaccinations, was peculiarly in a position to have become infected and to infect others.

219 F. Supp. at 791. Although *Shinnick* dealt with a factual situation slightly different from that involved here (a decision to quarantine an individual due to possible

exposure to smallpox), its rationale is equally applicable to the instant case. Educational institutions such as the Petitioner School Board cannot reasonably be expected to act with absolute certainty when they make decisions affecting the public health and safety. They cannot and should not be limited to taking the least-restrictive approach which might arguably suffice to deal with an identified risk. *Cf., Southeastern Community College v. Davis, supra* 442 U.S. at 413 n.12 (nursing program requirements based on safety considerations were reasonable, although possibly more restrictive than other states' licensing requirements for nurses). Where the risk is real and "significant," substantial deference should be given to an employer's determination as to what "qualifications" are necessary as a means of dealing with that risk. *Doe v. Region 13, supra*; *Doe v. New York University, supra* 666 F.2d at 777.

Petitioners' insistence on contagion-free elementary teachers cannot be characterized as unreasonable by virtue of the fact that Respondent was allowed to teach for a period of time after her condition became known, *Doe v. Region 13, supra* 704 F.2d at 409, particularly where Respondent initially obtained her position by failing to disclose that condition. *Doe v. New York University, supra* 666 F.2d at 777. Respondent simply has not demonstrated that Petitioners acted unreasonably either in identifying her as a risk, or in opting for her removal as the only means of effectively eliminating that risk.

Admittedly, Dr. McEuen did testify at trial that Respondent's serving in other capacities within the school

system might present only a minimal risk of infection, which might be acceptable from a medical viewpoint. [J.A. 11-15]. However, Dr. McEuen never deviated from her initial recommendation that Respondent should not be teaching third-grade students. Moreover, Petitioners' failure to "consider" whether Respondent was suitable for "some other position" in the school system cannot be deemed a failure to reasonably accommodate her, where Respondent was hired as an elementary teacher (at least in part due to her nondisclosure of her condition), and never expressed an interest in any other position.

An employer's duty of accommodation under Section 504 is limited to a consideration of whether a handicapped job applicant is, or can be made to be, "otherwise qualified" for the particular position in which the applicant has expressed an interest. *Gardner v. Norris, 752 F.2d 1271, 1281 (8th Cir. 1985)*. Similarly, with regard to handicapped individuals who have already been hired:

The duty to reasonably accommodate only contemplates accommodation of a qualified handicapped employee's present position. It does not include a requirement to reassign or transfer an employee to another position. Preferential reassignment for handicapped employees was not intended by the Rehabilitation Act. The Rehabilitation Act and its accompanying regulations indicate that the law requires reasonable workplace modification or accommodation in order to allow the handicapped person to remain in that position. There is nothing in the law or

accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position.

*Carty v. Carlin*, 623 F. Supp. 1181, 1188-89 (D. Md. 1985).

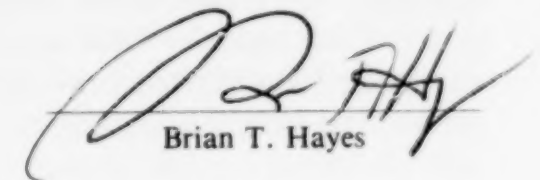
In the instant case, Petitioners did in fact "reasonably accommodate" Respondent in the position of elementary school teacher by declining to discharge her immediately upon learning of her tubercular condition. It was only after Respondent had suffered her third relapse in two years, and after a medical doctor had recommended her removal, that Petitioners took such action. By exhibiting such patience and deference to informed medical opinion, rather than immediately reacting with an intolerant and unthinking prejudice, Petitioners demonstrated full compliance with all the requirements that Section 504 can be reasonably construed to impose. Accordingly, the judgment below should be reversed.

### CONCLUSION

The decision of the Court of Appeals should be reversed, with instructions to reinstate the judgment of the district court.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the Petitioners Brief was furnished by U. S. mail to George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 11th day of July, 1986.

  
Brian T. Hayes

## APPENDIX 1

### Florida Statute 232.01 (1)(a): (2)

232.01 Regular school attendance required between ages of 6 and 16; permitted at age of 5; exceptions. —

(1)(a) All children who have attained the age of 6 years or who will have attained the age of 6 years by February 1 of any school year or who are older than 6 years of age but who have not attained the age of 16 years, except as hereinafter provided, are required to attend school regularly during the entire school term.

(2) Beginning with the 1985-1986 school year, any child who has attained the age of 6 years on or before September 1 of the school year and who has satisfactorily completed the requirements for kindergarten in public school in accordance with the pupil progression plan of the district or in a nonpublic school from which the district school board accepts transfer of academic credit, or who otherwise meets the criteria for admission or transfer in a manner similar to that applicable to other grades, shall be admitted or promoted to the first grade. However, for the 1985-1986 school year only, any child who has completed kindergarten under the conditions outlined above and will attain the age of 6 years on or before January 1 or who has demonstrated a readiness to enter the first grade in accordance with rules adopted by the state board shall be admitted to the first grade at any time during the school year.

## APPENDIX 2

### Florida Statute 232.032(1); (2)

232.032 Immunization against communicable diseases; school attendance requirements; exemptions.

(1) The Department of Health and Rehabilitative Services, after consultation with the Department of Education, shall promulgate rules governing the immunization of children against, the testing for, and the control of preventable communicable diseases. Immunizations shall be required for poliomyelitis, diphtheria, rubeola, rubella, pertussis, mumps, tetanus, and other communicable diseases as determined by rules of the Department of Health and Rehabilitative Services. The manner and frequency of administration of the immunization or testing shall conform to recognized standards of medical practice. The Department of Health and Rehabilitative Services shall supervise and secure the enforcement of the required immunization. Immunizations required by this act shall be available at no cost from the local county health units.

(2) The school board of each district and the governing authority of each nonpublic school shall establish and enforce as policy that, prior to admittance to or attendance in a public or nonpublic school, grades kindergarten through 12, or a public preschool, each child present or have on file with the school a certification of immunization for the prevention of those communicable diseases for which immunization is required by the Department of Health and Rehabilitative Services and further shall provide for appropriate screening of its pupils for scoliosis at the proper age. Such certification shall be made on forms approved and provided by the Department of Health and Rehabilitative Services and shall become a part of each student's permanent record, to be transferred when the student transfers, is promoted, or changes schools.

### APPENDIX 3

#### Florida Statute 232.23(6)

##### 232.23(6) Powers and duties of school board.

The school board, acting as a board, shall exercise all powers and perform all duties listed below:

(Sections (1) through (5) omitted as irrelevant)

(6) CHILD WELFARE. - Provide for the proper accounting for all children of school age, for the attendance and control of pupils at school and for proper attention to health, safety, and other matters relating to the welfare of children in the following fields, as prescribed in chapter 232.

### APPENDIX 4

#### Florida Administrative Code (1985)

#### Rules of State Board of Education

##### 6A-15.09 Provision of Special Programs.

- (1) All eligible students who participate in programs for exceptional students shall be provided special programs in a manner consistent with that described in approved district procedures beginning with FY 1978-79.
- (2) The provision of special programs shall be structured using the following patterns so that an exceptional student shall receive instruction through any one (1) or a combination of the following:

(Irrelevant parts omitted)

- (b) Non-public special day school or community facility through a contractual arrangement or other written agreement; or
  1. Residential facility, as used in these rules, shall mean state operated residential institutions which exceptional students who are clients of Mental Health, Youth Services, Retardation or Social and Economic Services reside.
  2. Residential facilities include:
    - a. Florida State Hospital
    - b. G. Pierce Wood Memorial Hospital
    - c. South Florida State Hospital
    - d. Northeast Florida State Hospital
    - e. Florida Mental Health Institute
    - f. North Florida Evaluation and Treatment Center

#### APPENDIX 4

- g. Youth Services: Training Schools and Start Centers
  - h. Sunland Centers
3. The instructional program in these residential facilities shall be structured so that an exceptional student may be provided individual instruction in the hospital or living units of these residential facilities when the student is under medical care for illness or injury which is acute or catastrophic in nature.
- a. To be eligible for individual instruction in the hospital or living unit, the following criteria apply:
    - (1) The exceptional student is *free of infectious or communicable diseases*; ... (emphasis added).